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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1939.

THE SCHRIBER-SCHROTH COMPANY,
Petitioner,
vs.
THE CLEVELAND TRUST COMPANY,
CHRYSLER CORPORATION,
Respondents.
No. [redacted] 9

THE ABERDEEN MOTOR SUPPLY COMPANY,
Petitioner,
vs.
THE CLEVELAND TRUST COMPANY,
CHRYSLER CORPORATION,
Respondents.
No. [redacted] 10

THE F. E. ROWE SALES COMPANY,
Petitioner,
vs.
THE CLEVELAND TRUST COMPANY,
CHRYSLER CORPORATION,
Respondents.
No. [redacted] 11

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

AND

SUPPORTING BRIEF.

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No. .....

PETITION FOR WRITS OF CERTIORARI

To the United States Circuit Court of Appeals for the Sixth Circuit.

To the Honorable the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioners, The Schriber-Schroth Company, The Aberdeen Motor Supply Company, and The F. E. Rowe

Sales Company, respectfully pray for writs of certiorari to the Circuit Court of Appeals for the Sixth Circuit to review the judgments of that court entered on October 6, 1939. The time within which this petition might be filed was extended by order of Mr. Justice McReynolds on January 6, 1940 (R. 2412).

SUMMARY AND SHORT STATEMENT.

These causes were before this court at the October, 1938, term. Certiorari granted, 304 U. S. 587.

Petitioners were defendants in the District Court where they prevailed on all issues. The Circuit Court of Appeals reversed the District Court in part, but did not pass on other questions involved in the appeal, 92 F. (2) 330. This court's decision, 305 U. S. 47 (see Appendix hereto), reversed the causes with remand to the Court of Appeals for further proceedings. Upon remand, the Court of Appeals again reversed the District Court in part upon some questions not determined in its first decision, but affirmed the District Court on questions on which the Court of Appeals had previously reversed the District Court.

The facts germane to the questions before this court on the original petitions are summarized in this court's opinion, and are set out in the original petition and in the petitions for rehearing. Since many of these facts are also germane to the questions presented in this petition, we will merely summarize them and add such facts as are necessary for an understanding of the questions now presented.

Respondent,* an Ohio corporation, the assignee, in trust under a pooling agreement, of some eighty patents relating to pistons, brought three separate suits against the re-

*The Cleveland Trust Company is herein referred to as "Respondent," Chrysler Corporation having been but a nominal and unwilling party plaintiff.

spective petitioners (three Cleveland dealers in pistons made by Sterling Products Corporation of St. Louis, Missouri), alleging infringement of five different piston patents issued on applications* of Mooers, Schmiedeknecht, Gulick, Jardine and Maynard, because of the sale by Petitioners of six piston structures. One of these accused devices (Exhibit 1) was alleged to infringe all of the five patents. Other accused devices have been found by all courts not to infringe.

Respondent entered into an agreement (Exhibit 38b, R. 1382) in 1924, whereby it granted to Aluminum Company of America an exclusive license under all patents covering aluminum pistons, then or thereafter owned by it. In the same instrument, Aluminum Company of America agreed to convey to Respondent (subject to such license) all patents relating to pistons per se, then or thereafter owned by it (R. 1391); and the Jardine patent was brought under that agreement before it issued by assignment from Aluminum Company of America (R. 1322).

A special Master to whom the causes were referred held all of the patents invalid, and if valid that no one of the accused devices infringed any of the patents. The District Court affirmed the Master. The Circuit Court of Appeals originally held the Gulick and Maynard patents valid, and infringed by one of the accused devices (Exhibit 1). While the Court of Appeals did not originally pass upon the Jardine patent, the Court of Appeals said in its original decision that Jardine "carries the Gulick concept an important step forward," and that "whatever Jardine contributed to the art, if anything, is said to be incorporated in Maynard."

*Stated in the order of their filing dates.

The Decision of the Court of Appeals.

Upon remand, the Court of Appeals (R. 2396) held the Gulick and Maynard patents invalid over the prior art as to all of the claims in issue when construed to omit flexible webs, but as to the Gulick patent the Court of Appeals deemed it "unnecessary to consider whether his amendments voided his patent." The Court of Appeals, however, held the Jardine patent valid over the prior art as to the claims in issue (1, 8 and 11), and infringed by Exhibit 1, which is the same accused device which the Court of Appeals previously held infringed the Gulick and Maynard patents.

In holding the claims in issue of the Jardine patent valid, the Court of Appeals found the Jardine invention to reside in a combination including "flexing webs" as essential elements in the patented combinations and distinguishing over the prior art, although "flexing webs" are not mentioned in any of the claims of the Jardine patent, but mentioned only in the description. It will be remembered that "flexing webs" is the feature which the Court of Appeals previously found to characterize the Gulick and Maynard patents, but which this Court held (Appendix pp. 8-10) was neither described nor claimed in the Gulick application as filed nor in the Maynard patent as issued.

Hence, the holding of the Court of Appeals is contrary to the decisions of this court in this cause, 305 U. S. 47; Permutit Co. v. Graver Corporation, 284 U. S. 52, and McCarty v. R. R. Company, 160 U. S. 110.

Jardine Surrendered Claims to Flexing Webs.

There are other facts and circumstances here which preclude reading "flexing webs" into the claims of the Jardine patent. Jardine surrendered claims to such "flexing webs" during the prosecution of the application be-

fore, the Patent Office; indeed, in interference proceedings with others (Gulick, Long and Hartog) the decisions were adverse to Jardine on claims including flexing webs, and Jardine thereupon canceled such claims.* During the prosecution of the Jardine application, after the conclusion of the interferences with Gulick, Long and Hartog involving claims for pistons with flexing webs, and which claims were lost by Jardine and canceled, there was no further reliance on flexing webs, but other structural features were relied on to distinguish from the prior art. The Jardine patent finally issued with claims, none of which mentioned flexing webs.

At no time during the prosecution of the Jardine application was it urged that Jardine was the inventor of a piston having flexing webs. In distinguishing from a Ricardo patent (R. 1717) the only thing that was stressed was that the splitting of the slippers of the Ricardo piston involved invention (R. 2053). Finally, after Jardine had lost the interferences on claims including flexing webs, he filed an amendment cancelling those claims (R. 2108) and presenting claims 28 and 34 (now claims 8 and 11 of the Jardine patent held valid by the Court of Appeals). The accompanying argument (R. 2113) stressed structural features, but did not mention flexible webs.

Summarizing the prosecution of the Jardine application in the Patent Office, we find the following: the original application described flexible webs; thereafter claims including flexible webs were added by amendment; thereafter interferences were declared involving such claims; thereafter decisions were rendered in these interferences ad-

*On April 30, 1923, Jardine added claims mentioning flexing webs (R. 2066-8). These claims were copied from pending applications of other parties (Gulick, Long and Hartog) and became the subject matter of interferences with them. In all of the interferences involving flexing webs, the decisions were adverse to Jardine. These are the following: No. 49,570 (R. 2071-3), No. 49,572 (R. 2076-8), No. 49,578 (R. 2086-8), No. 49,579 (R. 2088-90), No. 49,581 (R. 2090-3), No. 49,583 (R. 2094-6), No. 49,590 (R. 2098-2100).

versely to Jardine; thereafter Jardine canceled all claims including flexing webs and stressed structural features as distinguished from flexing webs; finally the Jardine patent issued with claims, none of which mentioned flexing webs. Under such circumstances, it is clear that the claims of the Jardine patent were not put forward as directed to combinations including flexing webs, and that the intention was not to include flexing webs.

The Long Use and Sale

The record in this cause shows that one Elmer Long* produced aluminum web pistons as early as 1917,† and that from 1917 to 1922 such pistons were the only aluminum pistons sold or used which automatically compensated for expansion. Respondent's witness admitted that the Long piston was the first split piston in commercial use (R. 986). The date of their existence and use was shown to have been before March 11, 1920, when Jardine filed his application, and there is no proof of any earlier date for Jardine. Actual Long pistons (Exhibits E, F, G and R) were identified by both Petitioners' (R. 378, 441, 350) and Respondent's witnesses (R. 661, 669, 680, 685) as being the same as those sold and used prior to Jardine's filing date. They testified that all were cut away or relieved before Jardine filed. Respondent's witness, Jeffries, testified about one of these pistons proved to have been in use before 1920, and which the witness himself had seen in 1920, as follows (R. 1009-10):

"Q. What do you say; do you think the webs weren't

*This is the same Long who was in interference with Jardine, and who prevailed in such interferences on claims including flexing webs.

†This Court said in its decision (Appendix pp. 4-5): "The Long piston, Patent No. 1,872,772 of 1932, which the Master and the District Court found, was in commercial use from 1917 on, and before the amendment of the Gulick application, presently to be discussed, showed longitudinal slits cut through the skirt, which was separated by air spaces from the piston head, the two being connected by parallel webs pierced for wrist pin bearings."

flexible enough? You have the piston before you, so you ought to be able to tell something about it.

A. No, there is flexibility in the webs."

Despite the above admission and the fact that this court said in its decision (Appendix p. 6),

> "the Long piston, whose webs **concededly were laterally flexible,"**

the Court of Appeals decided that the prior sale and use of these Long pistons were unavailing as a defense under the Patent Statute, R. S. 4886, the court saying that the webs of the Long pistons were not "known to have that (flexing) quality" or that this "was then understood."*

As against the unquestionable commercial success of the Long pistons before Long was stopped by the Trust Estate (R. 2261) Respondent offered no evidence of commercial success of the Jardine piston at all. As the Court of Appeals says in its first decision (R. 2392), "Jardine was without commercial recognition." Respondent's witness Jeffries admitted that the Jardine piston was subject to oil pumping (R. 145), while the Long piston had an excellent oil consumption record as early as March, 1919 (Ex. Z, R. 1629-30). There is no evidence as to the clearance required for operation of a Jardine piston, but we do know that the Maynard piston, said to be based on the Jardine piston, could not be used in a Franklin air-cooled engine (R. 528), although the Long piston was used in such an engine as standard production from 1920 to 1928 to a total of 350,000 (R. 672).

The decision of the Court of Appeals is based on a mis-

*The Court of Appeals also said in considering the statement in this court's opinion just quoted, that such observation of this court was not "to be taken as a conclusion that the webs were flexible in use," although the Court of Appeals had previously said in considering this question of flexibility "probably no one has seen an automobile piston reciprocating in its cylinder." Respondent offered no test of any Jardine pistons or of the accused pistons in an engine in order to determine their quality or whether the piston webs were flexible in use.

taken legal conclusion that, to be effective under R. S. 4886, the scientific explanation of the operation of a device, proved to have been in prior use and on sale, must have been understood by those skilled in the art. That, we contend, is contrary to this Court's decision in DeForest Radio Co. v. General Electric Co., 283 U. S. 664.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

Petitioners believe that the Writ of Certiorari should be granted in these cases for the following reasons:

I.

That the Court of Appeals for the Sixth Circuit misinterpreted or unduly limited this Court's decision in this case, 305 U. S. 47, and this Court's decision in Permutit Co. v. Graver Corporation, 284 U. S. 52, by refusing to hold a patent invalid where a feature found to be an essential element of the patented combination was not mentioned in the claims of the patent, and was in fact surrendered during the prosecution of the application, and after adverse decisions in interferences.

II.

That the Court of Appeals for the Sixth Circuit misinterpreted or unduly limited this court's decision in DeForest Co. v. General Electric Co., 283 U. S. 664, by refusing to hold a patent invalid where the feature, found to be an essential element of the patented combination, was actually present in a device proved to have been in use and on sale before the proved effective date of the patent in suit, unless the scientific explanation of the mode of operation of the device was understood.

III.

That the Court of Appeals has departed from the established law with respect to injunctions by holding that a patent litigant is entitled to an injunction restraining a trespass upon a right which the litigant does not own.

Public Importance.

This court previously granted certiorari in these cases, for the reason as stated in this Court's opinion, 305 U. S. 47:

> "We later granted certiorari, 304 U. S. 587, on a petition for rehearing showing that, notwithstanding the doubtful validity of the patents, litigation elsewhere with a resulting conflict of decision was improbable because of the concentration of the automobile industry in the Sixth Circuit. Cf. Paramount Publix Corporation v. American Tri-Ergon Corporation, 294 U. S. 464; Altoona Publix Theatres, Inc., v. American Tri-Ergon Corporation, 294 U. S. 477."

The conditions stated in the Petition for Rehearing still obtain in that approximately ninety-five per cent of the aumobiles are still produced in the sixth circuit, and that ninety-five per cent of the aluminum pistons manufactured in the United States are manufactured by manufacturers located in the sixth circuit or by Sterling Aluminum Products, Inc., which company has defended these causes and is defending a counterclaim for infringement of the Jardine patent in the sixth circuit. No suit against any other piston manufacturer in any other circuit has been filed to date. Hence, it is doubtful that this case could ever reach this court on the basis of conflicting decisions between different Circuit Courts of Appeal.

The comment of Court of Appeals anent this court's expressed reason for granting certiorari, viz:

> "It might be interesting to explore the availability of the Declaratory Judgment Act to dealers in other circuits to raise conflict"

overlooks the fact that respondent, an Ohio corporation, being the title holder of the patent, and hence the only party against whom declaratory judgment action can be brought, is not only a banking institution, but can only be sued in the sixth circuit.

Prayer.

Wherefore, your Petitioners respectfully pray that writs of certiorari be issued to the United States Circuit Court of Appeals for the Sixth Circuit to the end that these causes may be reviewed and determined by this court; that the decrees of the Circuit Court of Appeals for the Sixth Circuit be reversed, and that petitioners be granted such other and further relief as may be proper.

THE SCHRIBER-SCHROTH COMPANY,
THE ABERDEEN MOTOR SUPPLY COMPANY,
THE F. E. ROWE SALES COMPANY,

By JOHN H. BRUNINGA,
By JOHN H. SUTHERLAND,
Attorneys for Petitioners.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1939.

THE SCHRIBER-SCHROTH COMPANY, Petitioner, vs. THE CLEVELAND TRUST COMPANY, CHRYSLER CORPORATION, Respondents.	No. .....
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THE F. E. ROWE SALES COMPANY, Petitioner, vs. THE CLEVELAND TRUST COMPANY, CHRYSLER CORPORATION, Respondents.	No. .....

BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI.

OPINIONS OF COURTS BELOW.

The report of the Special Master before whom the case was tried on its merits is found in pages 1092 to 1189 of the Record. The Master's Findings of Fact and Conclusions of Law are found in pages 1096 to 1109 of the Rec-

ord. The Memorandum Opinion of the District Court overruling Respondent's exceptions to the report of the Special Master and adopting the Special Master's Findings of Facts and Conclusions of Law as those of the court is found at Record page 1230.

The first opinion of the Circuit Court of Appeals (Circuit Judges Hicks, Simons and Allen, Judge Simons writing) is reported at 92 F. (2d), page 330, and appears at pages 2381 to 2394 of the Record.

The previous opinion of this Court is reported at 305 U. S. 47 and is reproduced in an Appendix hereto. The opinion of the Circuit Court of Appeals on remand (Circuit Judges Hicks, Simons and Allen, Judge Simons writing) is not yet reported in the Federal Reporter,* but appears at pages 2396 to 2406 of the Record.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered October 6, 1939 (R. 2396).

The statute giving jurisdiction is Section 240-A of the Judicial Code (28 U. S. Code, Sec. 347).

STATEMENT OF THE CASE.

The foregoing petition contains a summary of the material facts necessary to an understanding of the reasons relied upon for the allowance of the writ, as well as a statement of questions involved in the case.

SPECIFICATION OF ERRORS.

1. That the Court of Appeals for the Sixth Circuit erred in finding and holding patentable a combination including an essential element not mentioned in the claims of the

*But it is reported at 43 U. S. Patent Quarterly 204.

Jardine patent in suit, and which was in fact surrendered during the prosecution of the application, and in refusing to follow this Court's decision in this cause, 305 U. S. 47, and this Court's decision in Permutit Co. v. Graver Corp., 284 U. S. 52.

2. That the Court of Appeals erred in refusing to hold the Jardine patent in suit invalid, when the feature found to be an essential element of the patented combination, was actually present in the same combination in devices proven to have been in prior use and on sale before the earliest proved date of the alleged invention of the patent in suit, and in refusing to follow this Court's decision in De Forest Radio Co. v. General Electric Co., 283 U. S. 664, 51 S. Ct. 563.

3. That the Court of Appeals erred in granting an injunction against infringement of the Jardine patent in suit by the sale of aluminum pistons by Petitioners where the Respondent, a banking institution, was simply an Assignee in Trust under a pooling agreement of some eighty patents, including the Jardine patent in suit and where Respondent had granted a license to Aluminum Company of America, a corporation, giving it the exclusive right to make, use and sell aluminum pistons under the pooled patents, including the Jardine patent in suit, and where Respondent was never entitled to make, use or sell aluminum pistons in accordance with the Jardine patent in suit.

4. That the Court of Appeals erred in reversing and in not affirming the judgment of the District Court holding the Jardine patent in suit invalid, and even if valid, not infringed, and in awarding any costs to Plaintiff-Respondent.

ARGUMENT.

I.

The Circuit Court of Appeals Treated "Flexing Webs" as Essential Elements of the Jardine Patent, and Held the Patent Valid Notwithstanding That Such Elements Are Not Mentioned in Any of the Claims, But Were in Fact Surrendered During the Prosecution of the Application After Adverse Decisions in Interferences, and Intentionally Excluded From the Patent as Essential Elements, and the Court of Appeals Refused to Follow the Decisions of This Court.

The Patent Statute, R. S. 4888 (35 U. S. Code 33), requires an applicant for a patent to not only file a written description of his invention but to

> "particularly point out and distinctly claim the part, improvement, or combination which he claims as his invention or discovery."

In White v. Dunbar, 119 U. S. 47, l. c. 51-52, this Court stated the purpose of the Patent Statute and the limits of the interpretation of claims as follows:

> "Some persons seem to suppose that a claim in a patent is like a nose of wax which may be turned and twisted in any direction, by merely referring to the specification, so as to make it include something more than, or something different from, what its words express. The context may, undoubtedly, be resorted to, and often is resorted to, for the purpose of better understanding the meaning of the claim; but not for the purpose of changing it, and making it different from what it is. The claim is a statutory requirement, prescribed for the very purpose of making the patentee define precisely what his invention is; and it is unjust to the public, as well as an evasion of the law, to con-

strue it in a manner different from the plain import of its terms."

In McCarty v. R. R. Co., 160 U. S. 110, l. c. 116, it was sought to read a feature into the claim of a patent to save it. This court says:

> "There is no suggestion in either of these claims that the ends of the bolster rest upon springs in the side trusses, although they are so described in the specification and exhibited in the drawings. It is suggested, however, that this feature may be read into the claims for the purpose of sustaining the patent. While this may be done with a view of showing the connection in which a device is used, and proving that it is an operative device, we know of no principle of law which would authorize us to read into a claim an element which is not present, for the purpose of making out a case of novelty or infringement. The difficulty is that if we once begin to include elements not mentioned in the claim in order to limit such claim and avoid a defence of anticipation, we should never know where to stop."

That case was cited with approval by this Court in Permutit Co. v. Graver Corp., 284 U. S. 52, which involved a situation as here, where the Court of Appeals had read into the claims of the patent what that court found was an essential element, namely, a "free" zeolite bed, while the claims mentioned only a "bed * * * of zeolites." While in that case the specification also failed to describe the bed as a "free" bed, this Court considered both phases (description and claims) of the Patent Statute, R. S. 4888. After stating that the claims did not "make mention of a 'free' zeolite bed" and that the patentee had "failed particularly to point out and distinctly claim the free zeolite bed," and that "the patent is void," this Court says (l. c. 59):

> "The absence in the claims of a sand bed placed above the zeolites does not imply that the zeolite bed is to be unconfined. The only normal inference from such silence is either that it was deemed immaterial whether the zeolite bed be locked or free, or that if a free bed is preferable, it was not claimed because it lacked novelty."

This Court then states the purpose of the Patent Statute as follows (l. c. 60):

> "The statute requires the patentee not only to explain the principle of his apparatus and to describe it in such terms that any person skilled in the art to which it appertains may construct and use it after the expiration of the patent, but also to inform the public during the life of the patent of the limits of the monopoly asserted, so that it may be known which features may be safely used or manufactured without a license and which may not. The free bed was neither described in the specification nor claimed in either Claim 1 or Claim 5."

In the decision of this Court in this cause, 305 U. S. 47, the situation was as in Permutit v. Graver with reference to the Maynard patent, in that neither the specification nor the claims mentioned "flexible webs" found by the Court of Appeals to be essential elements. This Court, after having considered Permutit v. Graver, and quoting the part just quoted therefrom relating to the claim requirement, says (Appendix p. 10):

> "We conclude that the court below erred in giving any effect to so much of the Gulick patent as by amendment describes or claims the flexible webs, and in treating any of the specifications or claims in Gulick and Maynard as referring to such webs."

While the specification may be resorted to "for better understanding the meaning of the claim" (White v. Dun-

bar, supra), and "with a view of showing the connection with which the device is used" (McCarty v. R. R. Co., supra), here we have a situation where the Jardine original application described flexing webs; thereafter claims including flexing webs were added by amendment; but in interference proceedings decisions were rendered adversely to Jardine, followed by cancellation of such claims and the retention and submission of claims, none of which mentioned flexing webs. Under such circumstances it cannot now be said that the intention was to include flexing webs in the claims. Here paraphrasing this Court's statement in Permutit Co. v. Graver Corp. (l. c. 59, 284 U. S.):

> the only normal inference from such silence is either that it was deemed immaterial whether the webs were rigid or flexing, or that if flexing webs were preferable, they were not claimed because they lacked novelty.

Such inference can be drawn in this case from the fact that Jardine lost claims including flexing webs in interference proceedings, and whether the Patent Office was right or wrong, the court cannot inquire, because the cancellation of the claims amounted to disclaimers (I. T. S. Rubber Co. v. Essex Rubber Co., 272 U. S. 429, 443). While that case did not involve cancellation after interference, the principle has been specifically applied to adverse judgments in interferences (Greenwalt v. American Smelting & Refining Company, 3 F. [2] 658, 660, affirmed 10 F. [2] 98, 99). In the above case it was held in the District Court that

> "Whatever is excluded in interference cannot be included in the patent; and whatever cannot thus be included cannot be claimed by construction."

II.

The Court of Appeals' Decision That the Long Pistons Were Unavailing as a Defense Under the Patent Statute, R. S. 4886, Although Prior to the Earliest Proved Date of the Alleged Invention of the Jardine Patent in Suit, Unless the Scientific Explanation of the Mode of Operation of the Long Pistons Was Understood, Is Contrary to the Decision of This Court in De Forest Radio Co. v. General Electric Co., 283 U. S. 664.

R. S. 4886 provides as a prerequisite to a valid patent that the subject matter shall not have been known or used or on sale before the invention date of the patent, and R. S. 4920 provides for such prior knowledge or use or sale as a defense. The Patent Statutes do not say that the scientific explanation of a prior known or used or sold device shall have been known to anybody.

In De Forest Radio Co. v. General Electric Co., 283 U. S. 664, this court considered a radio tube which had been used by De Forest prior to the effective invention date of the patent in that suit. This court said (l. c. 686):

> "Whether De Forest knew the scientific explanation of it is unimportant, since he did know and use the device and employed the methods, which produced the desired results, and which are the device and methods of the patent."

There is a distinction between a prior art patent and publication on the one hand and a prior use on the other hand. Where a prior patent or publication is involved, the description must be complete enough to enable one skilled in the art to reproduce what is described. When, however, it comes to a prior use, then we have the article in existence which can be duplicated, and it is therefore immaterial whether those skilled in the art knew what

the characteristics were, because of such facility for duplication. If the contrary were true, then the discovery of the scientific explanation of many things which had been in use would permit patents to be secured for those old things.

Here the Court of Appeals did not dispute the fact that before Jardine's earliest date, which is May 11, 1920, the filing of his application, that Long pistons of the character represented by Exhibits E, F, G and R were in existence, for that was in accordance with the testimony of Petitioners,' as well as Respondent's, witnesses, as shown in the Statement. Further, as shown in the Statement, it was conceded by Respondent's own witness and expert that in at least one of these pistons, Exhibit F, "there is flexibility in the webs."

We not only have one Long piston, but we have exemplifications of four pistons the like of which were proved to have been produced before Jardine filed. These pistons were not only produced in sand molds, but in iron molds, before Jardine filed; in fact the patterns and cores for the sand molds and metal molds are in evidence (R. 376), and have dates of existence as well as dates of use prior to Jardine's filing date. Here, therefore, we have a situation where we can even tell today whether the Long pistons prior to Jardine's filing date had flexible webs. By Jeffries' admission that Exhibit F has "flexibility in the webs," at least all of the Long pistons produced by the medium of the same core box and pattern must have the same characteristic, because of the well-known fact that castings produced by the medium of the same pattern and core box must be alike.

As shown in the Statement, all of the Long pistons were cut away or relieved in the regions of the bosses, although such relief is not shown in the Long patent because it was a common expedient, and therefore was deemed unnecessary to be shown on the patent. What Jardine did was to